No. 43098-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

PETER DAVIS,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

---

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

A. Was Davis's guilty plea knowing and voluntary?

B. Did the trial court err when it imposed an exceptional sentence without jury findings for the aggravating factors?

II. STATEMENT OF THE CASE

Davis was charged by second amended information with 10 counts of Violation of a Court Order – Domestic Violence. CP 1-15. Each count alleged that Davis violated the provisions of a valid protection order or no contact order issued by Thurston County District Court in State of Washington v. Peter James Davis, Cause No. 1Z0267715. CP 1-14. The State also alleged two aggravating factors, (1) unscored criminal history would result in a sentence that was presumptively too lenient and that (2) due to the high offender score some of the multiple current offenses would go unpunished (free crimes). CP 1-14. The charges stemmed from Davis making phone calls from within the Lewis County Jail to the protected party's phone number. Supp. CP APC.[1] Detective Breen had discovered 217 attempted calls to the protected party's phone number, but could only locate 22 telephone calls where Davis spoke to the protected party. Supp. CP APC. The State further

[1] The State will be submitting a supplemental designation of Clerk's papers to include the Affidavit of Probable Cause, (APC) and an amended Judgment and Sentence (AJS).

alleged that Davis had five prior convictions for violating protection orders. Supp. CP APC.

On February 15, 2012 the parties were in court to appear for trial. RP 1-2. Davis decided to a plea deal that required him to agree to plead guilty to five counts of violation of a domestic violence protection order with the agreement that the State dismiss the other five counts. RP 2; CP 1-14. Davis signed a Statement of Defendant on Plea of Guilty to Sex Offense (SDPG). CP 42-50. The SDPG listed Davis's offender score as 12 and his standard range of 60 months, the statutory maximum sentence. RCW 26.50.110(5), RCW 9A.20.021(1)(c); CP 43. The State's sentencing recommendation is contained on the SDPG. CP 45. Page 9 of the SDPG contains the following:

> 7. I plead guilty to:
> count I-V Violation of a Court Order in the 2nd Amended Information. I have received a copy of that Information.
>
> 8. I make this plea freely and voluntarily.
>
> 9. No one has threated harm of any kind to me or to any other person to cause me to make this plea.
>
> 10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.
>
> 11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is

> my statement: Between 5-31-11 and 7-1-11 on five separate occasions I knowingly violated a DV no contact order by contacting Melissa Kennedy who was the protected party in the order. I have had two prior convictions for violating a court order.
>
> 12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs and the "Offender Registration" Attachment, if applicable. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.

CP 49. Davis signed the SDPG as did his attorney, the prosecuting attorney and the judge. CP 64-65.

On February 15, 2012, in open court, the trial court judge had the following colloquy with Davis:

> THE COURT: All right, Mr. Davis do you agree with what I've been told here this morning?
>
> MR. DAVIS: Yes, I do.
>
> THE COURT: Now, did you review this statement of defendant on plea of guilty carefully with your attorney?
>
> MR. DAVIS: Yes, I have.
>
> THE COURT: Did you read it and understand it?
>
> MR. DAVIS: Yes, I do.
>
> THE COURT: Do you understand the elements, those are the things each of which the State is required to prove beyond a reasonable doubt in order to convict you of these charges?
>
> MR. DAVIS: Yes.

> THE COURT: Do you understand that the maximum penalty here is 60 months in prison?
>
> MR. DAVIS: Yes.
>
> THE COURT: And that is also the standard range?
>
> MR. DAVIS: Yes.
>
> …
>
> THE COURT: All right. To the amended information charging you with in counts one, two, three, four and five all with violation of a court order, domestic violence, what are your pleas, guilty or not guilty?
>
> MR. DAVIS: Guilty.

RP 3-4. Davis signed a Stipulation on Prior Record and Offender Score (Stipulation). CP 40-41. The Stipulation listed Davis's eight prior convictions as, (1) felony violation of a no contact order, (2) violation of a no contact order, (3) forgery, (4) forgery, (5) forgery, (6) forgery, (7) forgery and (8) theft in the second degree. CP 40. The form was originally filled out with prior conviction number two as a felony violation of a no contact order, but that was corrected when the prosecutor looked at the judgment and sentence for that conviction prior to Davis's sentencing on this case. RP 8-9; CP 40. The trial court reviewed this change with Davis and Davis stated he understood the change, which did not affect his range, and he agreed with it. RP 8-9.

During the sentencing hearing the State recommended 60 months on each count, to run concurrent with each other. RP 10. Davis's trial attorney also stated that 60 months was the agreed recommendation. RP 11. Davis elected, as is his right, to not make a statement. RP 13-14. While the trial court was starting to go through its pronouncement of sentence it stopped and asked, "[i]s it funny, Mr. Davis?" RP 15. To which Davis replied, "Yeah, I think it is. But I have nothing to say." The trial court then instructed the State to explain the aggravators and multiple current offenses, some going unpunished, acknowledging that the aggravating factors were not part of the plea agreement. RP 15. After hearing from the State the trial court imposed an exceptional sentence of 90 months, entering findings of fact and conclusions of law regarding the aggravating factors. RP18; CP 16-25. The trial court listed five different aggravating circumstances, any one of which independently could justify the imposition of the exceptional sentence. CP 25.

Davis timely appealed. CP 26-38. The trial court amended the judgment and sentence on April 11, 2012. Supp. CP AJS. This amendment clarified that the trial court was giving Davis an exceptional downward sentence on one count to run consecutive to

all other counts, thereby giving Davis a 90 month sentence. Supp. CP AJS.

III. ARGUMENT

A. DAVIS'S GUILTY PLEA WAS MADE KNOWINGLY, VOLUNTARILY AND INTELLEGENTLY.

Davis entered his guilty pleas with a complete understanding of the charges against him, his rights, and the facts to which he was admitting to. *See* RP 2-7; CP 16-25, 40-50. Upon review of the record, including the documents presented at the change of plea hearing it is clear there was a factual basis for Davis's guilty pleas.

Guilty pleas may only be accepted by the trial court after a determination of the voluntariness of the plea is made. CrR 4.2(d). Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citations omitted). The court rule requires a plea be "made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." CrR 4.2(d). Prior to acceptance of a guilty plea, "[a] defendant must be informed of all the direct consequences of his plea." *State v. A.N.J.*, 168 Wn.2d

91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations omitted). A plea cannot be considered voluntary if there is an insufficient factual basis for the plea. *In re Pers. Restraint of Evans,* 31 Wn. App. 330, 331, 641 P.2d 722 (1982), *cert. denied,* 459 U.S. 852 (1982). An alleged constitutional violation is reviewed de novo. *In re Det. of Strand*, 167 Wn.2d 180, 186, 217 P.3d 1159 (2009).

Davis argues that his plea was not knowing and voluntary because neither Davis nor the trial court established an acceptable factual basis for guilty pleas. Brief of Respondent 6-8. Davis rests this argument on what he believes is an insufficient statement regarding the two prior violation of no contact order that are required to elevate the five counts he pleaded guilty to a Class C felony rather than a gross misdemeanor. *See* RCW 26.50.110; Brief of Appellant 6-8. The State respectfully disagrees with Davis's evaluation of the evidence provided to establish the factual basis and argue to this Court that there was a factual basis for the guilty pleas and therefore the pleas were knowing and voluntary.

In order for a trial court to accept a guilty plea it must comply with the requirements of CrR 4.2(d). The rule requires a plea to be competently and voluntarily made and the defendant must have an

understanding of the consequences of the plea and the nature of the charge or charges. CrR 4.2(d). The trial court is also required to ensure there is a factual basis for the plea. CrR 4.2(d). A guilty plea cannot truly be voluntary if the defendant does not "possess an understanding of law in relation to the facts." *State v. S.M.*, 100 Wn. App. 401, 414, 996 P.2d 111 (2000), *citing In re Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1981) (other internal and external quotations omitted). This requires a judge to determine if the conduct admitted to by the defendant constitutes the charged crime in the information. *Id.* (quotations and citations omitted). The requirement is necessary because it "protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Id.* (quotations and citations omitted).

When the trial court determines there is a factual basis for the guilty plea it is not required to be convinced of the defendant's guilty beyond a reasonable doubt. *State v. Saas*, 118 Wn.2d 37, 43, 820 P.2d 505 (1991) (citation omitted). The trial court must conclude that there is "sufficient evidence for a jury to conclude that the defendant is guilty." *Id.* In determining the factual basis for a

guilty plea "the trial court may consider any reliable source of information in the record for determining whether sufficient evidence exists to support the plea." *Id.* When there is insufficient evidence to support the plea the proper remedy is to vacate the plea and dismissal of the charges. *State v. R.L.D.*, 132 Wn. App. 699, 706, 133 P.3d 505 (2006).

In *S.M.* a juvenile pleaded guilty to three counts of rape of a child in the first degree. *State v. S.M.*, 100 Wn. App. at 403. The State was alleging that 12 year old S.M. had sexual intercourse with his nine year old brother. *Id.* S.M. signed a statement of defendant on plea of guilty, which stated, "'In Cowlitz County in the Spring of 1994, I had sexual contact with my Brother who is age 10 in 1994. It happened three times." *Id.* The trial judge had a colloquy with S.M., asking S.M. if he knew what sexual intercourse was and S.M. responded he did. *Id.* at 404. The colloquy never established that when S.M. referred to sexual contact in his statement he meant sexual intercourse. *Id.* at 404. The court of appeals found that there was an insufficient factual basis to show that S.M. understood that sexual intercourse required penetration. *Id.* at 415. The court of appeals found that the record did not adequately show that S.M. understood the law in relation to the

facts of the case. *Id.* at 414-15. Therefore the court of appeals held that when the trial court accepted S.M.'s guilty pleas it violated his due process rights. *Id.* at 415.

The State had to prove Davis violated a no contact order and that he had two prior convictions for violating a court order as specified under the statute. RCW 26.50.110; CP 1-14.

> (1)(a) Whenever an order is granted under this chapter, chapter 7.90, 9. 94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
>
> > (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
> >
> > (ii) A provision excluding the person from a residence, workplace, school, or day care;
> >
> > (iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location;
> >
> > (iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or
> >
> > (v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

...

> (5) A violation of a court order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

RCW 26.50.110.

In the present case the record before the trial court at the time of Davis's guilty plea included his statement of defendant on plea of guilty, the Stipulation and the colloquy between the trial court and Davis. RP 2-7; CP 40-50. First it would appear that while the Stipulation was entered on February 15, 2012 at the change of plea and sentencing hearing, it had been previously signed by a deputy prosecutor, Davis and his trial counsel back on January 24, 2012. CP 40-41. The only change to the Stipulation came about when it was discussed, prior to sentencing, that the court needed to make a change to the Stipulation because number two was actually a gross misdemeanor violation of a no contact order, not a felony. RP 8.

MR. BLAIR: The only change on the stipulation on prior record, number two which says, "felony violation of a no contact order," the State actually had the judgment and sentence on that and it wasn't a felony. It's still a violation of a no contact conviction but not a felony.

MR. MEYER: That's correct. It started as a felony. Looks like it was pled down.

MR. BLAIR: And that probably was in conjunction with the number one case from the same county.

THE COURT: And number one is a felony.

MR. BLAIR: Yes.

THE COURT: All right. So on the stipulation on prior record and offender score, number 2, I will strike the word "felony" - -

MR. MEYER: Right.

THE COURT: - - so it is simply violation of a no contact order.

MR. MEYER: And that changes the offender score to 11.

MR. BLAIR: Which doesn't change the standard range time.

THE COURT: All right. Mr. Davis, do you understand all that.

MR. DAVIS: Yes.

THE COURT: Do you agree with it?

MR. DAVIS: Yes.

RP 8-9.

Davis read and filled out a statement on his statement of defendant on plea of guilty form. RP 3; CP 49-50. The form included the following statement:

> The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement: Between 5-31-11 and 7-1-11 on five separate occasions I knowingly violated a DV no contact order by contacting Melissa Kennedy who was the protected party in the order. I have had two prior convictions for violating a court order.

CP 49. The trial court also conducted the following colloquy with Davis:

> THE COURT: All right, Mr. Davis do you agree with what I've been told here this morning?
>
> MR. DAVIS: Yes, I do.
>
> THE COURT: Now, did you review this statement of defendant on plea of guilty carefully with your attorney?
>
> MR. DAVIS: Yes, I have.
>
> THE COURT: Did you read it and understand it?
>
> MR. DAVIS: Yes, I do.
>
> THE COURT: Do you understand the elements, those are the things each of which the State is required to prove beyond a reasonable doubt in order to convict you of these charges?
>
> MR. DAVIS: Yes.
>
> THE COURT: Do you understand that the maximum penalty here is 60 months in prison?

MR. DAVIS: Yes.

THE COURT: And that is also the standard range?

MR. DAVIS: Yes.

…

THE COURT: All right. To the amended information charging you with in counts one, two, three, four and five all with violation of a court order, domestic violence, what are your pleas, guilty or not guilty?

MR. DAVIS: Guilty.

…

THE COURT: All right. Mr. Davis, are you making those pleas freely and voluntarily?

MR. DAVIS: Yes, I am.

THE COURT: Has anyone made any threats or promises to you to make you plead guilty?

MR. DAVIS: No.

THE COURT: Have you been told what the prosecutor will recommend for a sentence?

MR. DAVIS: Yes, I have.

THE COURT: You understand that I'm not bound by anybody's deals or anybody's recommendation and I could impose any sentence up to the maximum.

MR. DAVIS: Yes.

THE COURT: All right. Is this your statement: "Between May 31, 2011 and July 7, 2011"?

MR. BLAIR: Yes.

THE COURT: "On five separate occasions I knowingly violated a domestic violence no contact order by contacting Melissa Kennedy who was the protected party in the order. I've had two prior convictions for violating a court order."

MR. DAVIS: Yes, it is.

THE COURT: You agree that the prior domestic violence protection order was a valid order?

MR. DAVIS: Yes.

THE COURT: And that you had knowledge of that order?

MR. DAVIS: Yes.

THE COURT: And you knowingly violated it by making the phone calls?

MR. DAVIS: Yes, I did.

RP 3-6.

There was sufficient evidence for a jury to find that Davis had two prior convictions for a no contact order as specified in RCW 26.50.110. Davis argues that his two prior convictions could have been anti-harassment order convictions, which would not trigger the elevation of the charge to a felony, because Davis never specified it was the type of order listed under RCW 26.50.110. *See* RCW 26.50.110, RCW 10.14; Brief of Appellant 7-8. While the statement of defendant on plea of guilty does state Davis has two

prior convictions for violating a court order, not specifying what type of order, it is clear from the colloquy that Davis understood what charges he was pleading to as alleged in the information and he was pleading guilty understanding he had been convicted twice before for a violation of a no contact order. RP 3-7. Davis previously signed, three weeks prior, the Stipulation, which the trial court had in its possession. RP 7-8; CP 40-41. While the Stipulation is not mentioned during the actual colloquy, the record is clear that the trial court had it in its possession prior to sentencing because at the time of sentencing the parties informed the trial court that a correction needed to be made and the trial court was the one who made the correction to the Stipulation. RP 7-8. The Stipulation lists Davis's criminal history in part as; (1) Felony violation of a no contact order and (2) ~~felony~~ violation of a no contact order. CP 40. This document is signed by Davis and acknowledged orally as correct during a later portion of the proceedings. RP 8-9; CP 40-41. There was a sufficient factual basis for Davis's guilty pleas on all five counts and his convictions should be affirmed.

B. THE TRIAL COURT PROPERLY IMPOSED AN EXCEPTIONAL SENTENCE.

The trial court imposed an exceptional sentence of 90 months. CP 16-25; Supp. CP AJS. The trial court listed five findings of fact which each independently justify the exceptional sentence:

> (a) The defendant has extensive unscored criminal history.
>
> (b) Given the defendant's conduct, the standard range sentence would result in a sentence that is clearly too lenient.
>
> (c) The defendant's offender score is such that some of his current convictions would go unpunished.
>
> (d) The uncharged offenses in this matter are justifiable basis for an exceptional sentence.
>
> (e) The defendant's attitude (smiling smirking and admitting that he thought the proceedings were funny) show a complete lack of remorse and an unrepentant attitude.

CP 25; Supp. CP AJS. The trial court made the specific finding that the grounds listed above, "taken together or considered individually, constitute sufficient cause to impose the exceptional sentence." CP 25; Supp. CP AJS. The trial court also found that it "would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid." CP 25; Supp. CP AJS.

The Sixth Amendment of the United States Constitution guarantees individuals the right to trial by jury. The Sixth Amendment is violated when a trial court imposes an exceptional sentence based upon facts not found by a jury beyond a reasonable doubt absent those facts being stipulated to by the defendant. *In re Beito*, 167 Wn.2d 497, 503, 220 P.3d 489 (2009). A defendant may challenge such a sentence after pleading guilty without first withdrawing his or her plea. *Id.* There are aggravating factors that need not be proven to a jury beyond a reasonable doubt that allow a judge to impose an exceptional sentence. RCW 9.94A.535(2). The fact of a criminal conviction need not be proven to a jury for providing the basis for an exceptional sentence. *State v. Newlum*, 142 Wn. App. 730, 738, 176 P.3d 529 (2008).

> The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:
>
> (a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.
>
> (b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

> (c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.
>
> (d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

RCW 9.94A.535(2).

In a sentencing hearing, "[a] criminal history summary relating to the defendant from the prosecuting authority . . . shall be prima facie evidence of the existence and validity of the convictions listed therein." RCW 9.94A.500. The State must prove a defendant's prior criminal convictions by a preponderance of the evidence. RCW 9.94A.500(1); *State v. Kippling*, 166 Wn.2d 93, 101, 206 P.3d 322 (2009). "[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability or is unsupported in the record." *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999) (citations omitted). Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

When the State is tasked with proving prior convictions a certified copy of the judgment and sentence is the best evidence. *In re Adolph*, 170 Wn.2d 556, 566, 243 P.3d 540 (2010), citing *State v. Ford,* 137 Wn.2d 472, 480, 973 P.2d 452 (1999) (internal quotations and other citations omitted). "However, the State may introduce other comparable documents of record or transcripts of prior proceedings to establish criminal history." *Id.* (citations and quotations omitted).

The State concedes that Findings of Fact (b), (d) and (e) were factors that would have required jury findings because they deal with more than assessing criminal history. The State also concedes that Finding of Fact (a) was not sufficiently proven because the only evidence submitted was the prosecutor's recitation of the convictions and the defendant's case history print out. *See* 16-17; ID 2.

In regards to Finding of Fact (c), that the defendant's offender score is such that some of his current convictions would go unpunished, this finding was within the trial court's discretion and properly found. CP 25, 40-41. Davis stipulated to part of his criminal history, which included felony convictions for theft in the second degree, five separate counts of forgery and a felony

violation of a no contact order. RP 7-8; CP 40-41. This gave Davis an offender score of seven prior to entering is pleas of guilty on five counts of felony violation of a no contact order. RCW 9.94A.030(11), RCW 9.94A.525; CP 40-41. With Davis's five current convictions he ended up with nine plus, and if one actually adds up all the points Davis would have an offender score of 11. RCW 9.94A.525; CP 40-41. A felony violation of a domestic violence no contact order is a Class C felony, punishable by a maximum term of 60 months. RCW 26.50.110(5); RCW 9A.20.020(c). A felony violation of a domestic violence no contact order is a level V offense and once an offender has eight points the sentence is 60 months. RCW 9.94A.510, RCW 9.94A.515. Therefore, in this case once Davis was sentenced to two of the five counts he pleaded guilty to his sentence was the statutory maximum sentence allowed for a Class C felony conviction. RCW 9A.20.020(c), RCW 9.94A.510, RCW 9.94A.515. The remaining three counts therefore go unpunished and are "free crimes" absent an exceptional sentence. Without an exceptional sentence, the court in essence, rewards Davis for his repeated flagrant disregard for the law and the protection order by not punishing him for his

separate distinct acts which violated the protection order and resulted in the criminal convictions.

Davis makes a quick footnote citation regarding unscored criminal history. Brief of Appellant 9, footnote 3. Davis asserts, "[u]nscored criminal conduct and free crimes analysis do not justify an exceptional sentence absent a finding that the standard range would be clearly too lenient," citing to *State v. Hughes,* 154 Wn.2d 118, 134, 139-140, 110 P.3d 192 (2005). Davis fails to acknowledge to this Court that the court in *Hughes* was dealing with the former RCW 9.94A.535(2)(i) which stated, "[t]he operation of the multiple offense police of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purposes of this chapter, as expressed in RCW 9.94A.010." *See State v. Alvarado,* 164 Wn.2d 556, 563, 192 P.3d 345 (2008), *citing* former RCW 9.94A.535(2)(i); *State v. Hughes*, 154 Wn.2d at 136-40. The current statutory language only requires, "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). The Supreme Court has already held that the current statutory language does not require a clearly too lenient finding, which would have to be a jury finding

because it requires more than just determining an offender score. *State v. Alvarado*, 164 Wn.2d at 566-68.

The trial court made the specific finding that any one of the grounds it listed for an exceptional sentence, considered individually, would be sufficient to impose an exceptional sentence. CP 25. Therefore, although grounds (a), (b), (d) and (e) were not properly found, the "free crimes" aggravating factor listed under section (c) of the Findings of Fact was properly imposed. CP 25. The trial court later clarified in the amended judgment and sentence that it was giving Davis and exceptional downward sentence on count I in order to facilitate a 90 month sentence because the trial court felt a longer sentence would be excessive. Supp. CP AJS. This Court should affirm Davis's sentence.

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IV. CONCLUSION

For the foregoing reasons, this court should affirm Davis's plea of guilty to five counts of felony violation of a domestic violence no contact order. Davis's sentence should similarly be affirmed.

RESPECTFULLY submitted this 3rd day of July, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

July 03, 2012 - 2:24 PM

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